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## PREVENTIVE EMPIRES: SECURITY DYNAMICS AT MULTIPLE LEVELS OF GOVERNANCE

Monica den Boer\*

### Introduction

Security is a dynamic and multi-layered concept. To many, security means ‘feeling secure’ (subjective security), to others it means ‘measured security’ (objective security), but it can also refer to security provision, security distribution or security instruments. In this article, I analyze some of the conceptual shifts in the security paradigm.<sup>1</sup> These evolve from deeper societal transformations, including globalisation, privatisation, pluralisation and hybridisation. The paradigmatic shifts have been addressed in new security strategies at the local, national and international levels of governance. Increasingly, the re-framing of local, national and international security strategies is founded on the notion of *prevention*. Thus, security discourses embrace notions such as anticipatory *risk assessment* by seeking to predict the outcome of multiple futures, applying *pre-emption* in internal as well as external security environments as well as the widespread use of surveillance instruments for the *pro-active* monitoring of movements, transactions, careers and intentions.<sup>2</sup> The growing popularity of this so-called *precautionary principle* at all levels of security governance raises several questions about the reliability of early indicators and the possible erosion of the classic presumption of innocence. The increased focus on radicalisation, terrorism and organised crime has gradually paved the path for the employment of proactive and preventive monitoring as regular means to monitor and control human behaviour. This article seeks to contribute to the discussion on how the contractual relationship between the state and its citizens may be affected and on the political and legal challenges that derive from it.

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<sup>1</sup> This article is based on a book chapter which was published in M. den Boer (2010), “Revolving Doors: Ethics in a Shifting Security Paradigm”, in M. den Boer and E. Kolthoff (eds.), *Ethics and Security*, The Hague, Eleven International Publishing, 15-37.

<sup>2</sup> M. De Goede, ‘The Politics of Preemption and the War on Terror in Europe’, *European Journal of International Relations*, 2008-14 (1), 161-185.

## I. Shifting Security Strategies

The notion of security has been the subject of reflection by several authors such as Buzan, Wæver & De Wilde.<sup>3</sup> The concept of security has been defined as 'liquid'<sup>4</sup> as well as 'utopian'.<sup>5</sup> Complex societal issues are likely to become 'securitised', in the sense that by claiming that a referent object is under threat (e.g. the environment, collective health, public transport, public order), a security actor performs a series of (often extraordinary) measures which should contain the security threat or lead to its decrease.<sup>6</sup> Security is thus seen as a social construction. Migration, for instance, has been subject to both politicisation and securitisation, particularly in the post 9/11 era, where immigration law has become an essential pillar of anti-terrorism legislation.<sup>7</sup> The globalisation of security can be regarded as a main push factor for the shifting security paradigm. One of the core characteristics of the globalisation of security is the merging of global threats and local fears.<sup>8</sup> At the same time, 'glocal' connections that exist on the basis of trade and commerce, internet, migration and travel, rest on a texture which is increasingly characterised by global solidarity and shared vulnerability.<sup>9</sup>

Several authors engage in a modelling of the shifting governance of security. Security governance is often exercised by an intricate web of actors who operate across national borders and take recourse to intensive surveillance measures.<sup>10</sup> Furthering the work of Castells, authors like Bayley, Shearing, Johnston, Wood and Gilleir *et al.* have written about the 'nodal governance' of security, which defines the provision of security as security bundles provided by

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<sup>3</sup> B. Buzan, O. Wæver, & J. De Wilde, *Security: A new framework for analysis*. London: Lynne Rienner 1998.

<sup>4</sup> L. Zedner, 'Seeking security by eroding rights: The side-stepping of due process', in B.J. Goold & L. Lazarus (eds.) *Security and human rights*, Oxford and Portland Oregon: Hart Publishing 2007, pp.257-275

<sup>5</sup> H. Boutellier, *De veiligheidsutopie. Hedendaags onbehagen en verlangen rond misdaad en straf*, The Hague: Boom Juridische Uitgevers 2002.

<sup>6</sup> Buzan, Wæver, & De Wilde 1998, *supra* note 3; U. Beck, *Risk Society. Towards a New Modernity*, London: Sage Publications 1992; K. F. Aas, *Globalization & Crime*, London: Sage 2007, p. 32.

<sup>7</sup> Aas 2007, *supra* note 6, p. 87; J. Huysmans, *The politics of insecurity. Fear, migration and asylum in the EU*, London: Routledge 2006; M. den Boer, '9/11 and the Europeanisation of anti-terrorism policy: A critical assessment', *Notre Europe*, Paris, Policy Papers no. 6, 2003; M. den Boer, M. 'Immigration and its effects on the security discourse in Europe: Time for demystification', *Amsterdam Law Forum*, 2008-1(1), pp. 53-64.

<sup>8</sup> Aas 2007, *supra* note 6, p. 2; J. Medcalf, *Going global or going nowhere? NATO and the management of post-Cold War international crises*. Bern: Peter Lang 2008, p. 21.

<sup>9</sup> Aas 2007, *supra* note 6, p. 3.

<sup>10</sup> See for example M. den Boer, & J. van Buuren, 'Surveillance Assemblages: Preventing Crime and Terrorism Through Data Monitoring', in J. Blad, M. Hildebrandt, K. Rozemond, M. Schuilenburg, and P. Van Calster (eds.), *Governing Security under the Rule of Law?*, The Hague, Eleven International Publishers, 2009, pp. 215-231; E. Guild, *Global Data Transfers: The Human Rights Implications*, INEX Policy Brief, No. 9, May 2010, <http://www.ceps.eu> (12 July 2011) and J. Lodge, *Quantum Surveillance and 'Shared Secrets' A Biometric Step Too Far?*, CEPS Liberty and Security in Europe, Brussels, July 2010; <http://www.ceps.eu>, (12 July 2011).

a range of authorities.<sup>11</sup> This follows a line of thought, where governance – not merely of security, but also of other large-scale issues like healthcare, education and transport – has become fragmented and pluralised. Hence, the ‘pluralisation’ of security is one of the main trends identified in security governance.<sup>12</sup>

Despite the multi-layering, fragmentation, cross-border transcendence and localisation, state and security remain strongly interconnected.<sup>13</sup> Different layers of government continue to invest in public security, often in combination with private players. This lies in a “combination of the symbolic power, cultural authority and public legitimacy” of the public security service, “together with the access to sources of information and intelligence (notably crime-related data) that it facilitates.”<sup>14</sup>

Globalisation, privatisation, pluralisation and hybridisation are thus jointly responsible for a shifting security paradigm and entail a fundamental reorientation of the role of the state in the provision of security.<sup>15</sup> States build their governmental power on the perpetual logic of security deficits and crises. As they themselves have become anxious actors – afraid to make errors in their calculation of risk – they build a preventative logic in the definition of their security policies.<sup>16</sup>

## II. Preventive Security Empires

Recent security strategies have been restyled and now focus on the fusion between internal and external security. The interconnection between different approaches is strongly promoted within the different security strategies that have been defined at the local, national and international level. Looking at the nation-state level within the European Union (EU), it is instructive to analyse

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<sup>11</sup> M. Castells, *The rise of the network society* (2<sup>nd</sup> ed.). Oxford: Blackwell 2000; D.H. Bayley & C.D. Shearing, (*The new structure of policing; Description, conceptualization, and research agenda*, National Institute of Justice, Washington D.C.: Department of Justice. report 187083, 2001; L. Johnston & C. Shearing, *Governing security*. London: Routledge 2003. J. Wood & C. Shearing, *Imagining Security*. Devon: Willan Publishing 2007; F. Gilleir, *et al.*, ‘Checking aspects of a “Nodal Orientation” for policing the Port of Antwerp.’ In M. Cools *et al.* (ed.), *Governance of Security Research Paper Series: 2. Readings on Criminal Justice, Criminal Law & Policing* Antwerp: Maklu 2009, pp. 359-376.

<sup>12</sup> M. Button, *Doing security. Critical reflections and an agenda for change*. Basingstoke: Palgrave/MacMillan 2008, p. 3.

<sup>13</sup> A. Crawford, ‘Networked governance and the post-regulatory state? Steering, rowing and anchoring the provision of policing and security’. *Theoretical Criminology*, 2006-10(4), p. 458; I. Loader & N. Walker, ‘Policing as public good: Reconstituting the connections between policing and the state.’ *Theoretical Criminology*, 2001-5(1), p. 24.

<sup>14</sup> Crawford 2006, *supra* note 13, p. 463.

<sup>15</sup> L. Lazarus & B.J. Goold, ‘Introduction: Security and human rights.’ In Goold, B.J. & Lazarus, L. (eds.), *Security and human rights*, Oxford and Portland Oregon: Hart Publishing 2007, p. 5).

<sup>16</sup> P. Ramsay, ‘The Insecurity State’, in J. Blad *et al.*, (eds.), *Governing Security under the Rule of Law?*, The Hague, Eleven International Publishers 2009, p. 44; See also C.R. Sunstein, *Laws of Fear. Beyond the Precautionary Principle*. Cambridge: University Press 2005.

the argumentation in the British National Security Strategy.<sup>17</sup> The Strategy document argues that the international landscape has been transformed, in the sense that the bipolar power construction has been replaced by a more complex and unpredictable pattern of relationships. Furthermore, the Strategy document presents a considerable shift in the security landscape and establishes that former threats have been replaced by a series of interconnected factors, such as globalisation, climate change, asymmetric distribution of wealth and welfare, competition for energy, as well as demographic shifts.<sup>18</sup> As a consequence, this “single overarching strategy”<sup>19</sup> deals with threats emanating from transnational crime, pandemics and flooding, threats that are potentially harmful to large groups of citizens. The British document regards “early engagement”<sup>20</sup> as a method to tackle the *root causes* of terrorism and radicalisation. Across the national borders, this can be done by supporting fragile states, to prevent them from further decline. In the spirit of an integrated approach, a multi-lateral and multi-agency strategy is advocated: the police, armed forces, border inspection, intelligence and security services are ushered to build coalitions, together with the private and ‘third’ sector.

Hence, the shift toward the preventive (early) intervention, even beyond national borders, is noticeable: “Wherever possible, we will tackle security challenges early. We are committed to improving our ability to scan the horizon for future security risks, and to developing our capabilities for preventive action.”<sup>21</sup> Thus, the document codifies *pre-emptive action*.<sup>22</sup> The term ‘pre-emption’ became official part of the discourse when – under United States President G.W. Bush – the National Security Strategy of the United States of America marked the end of the deterrence strategy which characterised the Cold War and heralded a new doctrine which codified action against ‘emerging threats’. Carrying out a pre-emptive strike against a country before the other side undertakes military action and before there is a formal declaration of war raises several ethical questions.<sup>23</sup> The war in Iraq, for instance, was driven by

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<sup>17</sup> Cabinet Office, *The national security strategy of the United Kingdom. Security in an interdependent world*, Presented to Parliament by the Prime Minister, by command of Her Majesty, Cm 7291. London: The Stationary Office 2008.

<sup>18</sup> *Ibid*, p.: 3; O. Kessler, ‘Risk’. In P. Burgess (ed.), *The Routledge Handbook of New Security Studies* London and New York: Routledge, 2010, p. 17.

<sup>19</sup> Cabinet Office 2008, *supra* note 17, p. 3.

<sup>20</sup> *Ibid*, p. 7.

<sup>21</sup> *Ibid*.

<sup>22</sup> M. Houben, *Better Safe than Sorry: Applying the Precautionary Principle to Issues of International Security*, CEPS Working Document No. 196, Brussels 2003; <http://aei.pitt.edu/id/eprint/1816>, (12 July 2011).

<sup>23</sup> M. Kaldor, ‘From just war to just peace’. In J. De Wilde, & M. Den Boer (eds.), *The viability of human security*, Amsterdam: Amsterdam University Press 2008, pp. 21-46; D. Verweij, ‘Military Ethics: A Contradiction in Terms’, in M. Den Boer & E. Kolthoff (eds.), *Ethics and Security*, The Hague, Eleven International Publishing 2010 pp. 121-139.

precautionary motives and was based on an apocalyptic fear of Weapons of Mass Destruction.<sup>24</sup>

In a similar vein, the National Security Strategy of the Netherlands<sup>25</sup> acknowledges that the cause of several security problems may be beyond its national borders. Moreover, it observes the diffusion of security threats and seeks to establish an integrated risk assessment and multi-agency approach. Several vital interests are identified, notably territorial, economic, ecological and physical safety, and socio-economic stability. Further, it seeks to build in a *forecasting perspective* on the basis of horizon scanning, risk assessment and scenario-building, while making it coherent with international security strategies.

At an international level of security governance, the EU Security Strategy<sup>26</sup> advocates an integrated strategy with a prominent position for *preventive interventions*. The key threats identified by the EU Security Strategy are: terrorism and violent religious extremism; the proliferation of weapons of mass destruction, including the spread of missile technology; regional conflicts; state failure; and organised crime.<sup>27</sup> The EU concept of a comprehensive security strategy rests on a diffuse threat analysis. Compared with the American perception of security threats, which has lately focused on the threat emanating from global terrorism, the EU promotes a security strategy which emphasises the root causes of terrorism, radicalisation and organised crime.<sup>28</sup>

This means that the EU seeks to deploy civilian instruments alongside military forces in its approach to conflicts or struggles with a fragmented authority.<sup>29</sup> The strategy thus promotes a comprehensive approach, particularly by outlining the potential contribution of the EU to crisis management operations.<sup>30</sup> The EU Security Strategy views globalisation as a mixed blessing:

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<sup>24</sup> T. Arnoldussen, 'Deus sive Natura: Investigating the Axioms of Precautionary Logic', in J. Blad *et al.* (eds.), *Governing Security under the Rule of Law?*, The Hague, Eleven International Publishers 2009, p. 77.

<sup>25</sup> Strategie Nationale Veiligheid, [www.minbzk.nl/asp/download.aspx?file=/contents/pages/87407/...](http://www.minbzk.nl/asp/download.aspx?file=/contents/pages/87407/...)

<sup>26</sup> Council of the European Union, *A Secure Europe in a Better World. European Security Strategy*. Brussels, 12 December 2003.

<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> (19 July 2011). See also Report on the implementation of the EU Security Strategy, Brussels, 11 December 2008: [http://www.eu-un.europa.eu/documents/en/081211\\_EU%20Security%20Strategy.pdf](http://www.eu-un.europa.eu/documents/en/081211_EU%20Security%20Strategy.pdf), (19 July 2011).

<sup>27</sup> Council of the European Union 2003, *supra* note 26.

<sup>28</sup> Council of the European Union, *Draft Internal Security Strategy for the European Union: "Towards a European Security Model"*, Brussels, 23 February 2010, p. 3; <http://register.consilium.europa.eu/pdf/en/10/st05/st05842-re02.en10.pdf> (19 July 2011).

<sup>29</sup> M. Drent, & D. Zandee, *Breaking pillars. Towards a civil-military security approach for the European Union*. The Hague, Netherlands Institute of International Relations 'Clingendael', Clingendael Security Paper No. 13 2010, p. 2.

<sup>30</sup> *Ibid*, p. 6.

on the one hand, it encourages free trade and mobility<sup>31</sup> while on the other it contributes to frustration and injustice. Pandemics, energy, water, food and economic challenges are all seen as issues closely interconnected with (in-) security.

In line with the EU, the North Atlantic Treaty Organization (NATO) opines that security at home means security abroad.<sup>32</sup> In the meantime, NATO has been involved in developing a new Strategic Concept<sup>33</sup> to tackle 'new threats', such as cyber attacks, piracy, large-scale energy disturbance and fragile states.<sup>34</sup> NATO acknowledges the emergence of a number of "diverse non-traditional security threats", which challenge the organisation to step beyond its original role. A key characteristic of newly emerging threats is that they no longer have to occur within NATO territory: "they could affect NATO's security even if they originated from beyond NATO's borders."<sup>35</sup> Similarly, NATO works with a *predictive method* and as such it has initiated a 'multiple futures project', inspired by a growing range of challenges that it may currently not be equipped to deal with.<sup>36</sup> Opting for a 'spiral approach', the NATO discussion is meant to lead to a common understanding of key strategic trends, their drivers and a series of possible futures from which the potential challenges facing NATO and their implications<sup>37</sup> could be discussed.

Hence, at the level of international security governance, the common denominator between the European and the American approach is the notion of *early defence*. As argued above, the National Security Strategy of the USA outlined the need for *anticipatory action* "to defend ourselves".<sup>38</sup> The EU Security Strategy says that "We need to be able to act before countries around us deteriorate, when signs of proliferation are detected, and before humanitarian emergencies arise. *Preventive engagement* can avoid more serious problems in the future."<sup>39</sup> The EU employs the discourse of enhancing the security in neighbouring regions and third states, e.g. by using the strategy

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<sup>31</sup> M. Cools, D. Davidovic, H. De Clerck, & E. De Raedt, 'The international private security industry as part of the European Union security framework: A critical assessment of the French EU Presidency White Paper'. In M. Cools, *et al.* (eds.), *EU and international crime control. Topical issues*, Governance of Security Research Paper Series. Antwerp: Maklu 2010, pp.123-136

<sup>32</sup> Adviesraad Internationale Vraagstukken *Crisisbeheersingsoperaties in fragiele staten. De noodzaak van een samenhangende aanpak*. The Hague 2009, No. 64 [www.aiv-advies.nl](http://www.aiv-advies.nl), p. 12

<sup>33</sup> NATO's 1999 Strategic Concept outlines NATO's fundamental security tasks as security, consultation, deterrence and defence, crisis management and partnership, in Medcalf, *supra* note 8, p. 19.

<sup>34</sup> Adviesraad Internationale Vraagstukken *Het nieuwe strategisch concept van de NAVO*. The Hague 2010, No. 67, [www.aiv-advies.nl](http://www.aiv-advies.nl), pp. 34-35

<sup>35</sup> Medcalf, *supra* note 8, p. 17.

<sup>36</sup> NATO Allied Command Transformation, *Multiple Futures Project. Project Initiation Document (PID)*. Version 1.5, April 2008.

<sup>37</sup> *Ibid.*

<sup>38</sup> G. W. Bush, *The National Security Strategy of the United States of America* September 2002, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA406411&Location=U2&doc=GetTRDoc.pdf>, p. 15; (19 July 2011).

<sup>39</sup> Council of the European Union 2003, *supra*, note 26, p. 11; emphasis is the author's.

of Security Sector Reform.<sup>40</sup> The EU Security Strategy also proposes that 'common actions' are best based on common appreciations of risk: the sharing of intelligence between Member States and partners of the EU is therefore strongly promoted.<sup>41</sup>

The fusion between internal and external security seems to establish the pretext for an increased focus on extraterritorial engagement in combination with an early intervention doctrine. Within the external security sphere, the Responsibility to Protect principle (R2P)<sup>42</sup> has gradually gained ground, albeit with controversial discussions concerning the legal legitimacy of military interventions in foreign jurisdictions and the recourse to "vocabularies of imperialism".<sup>43</sup> The R2P principle relates both to intervention as well as prevention and reconstruction.<sup>44</sup>

All security actors, whether they operate at a national or international level, seem to have unfolded a preventive and even pre-emptive strategy which provides them with legitimate arguments to intervene proactively, in the sense that the intervention beyond their own territory is seen as necessary in order to protect their own security. In the recent past, this has been done in the context of combating drug trafficking, counter-terrorism as well as the prevention of irregular migration.<sup>45</sup>

### III. Preventive Logic in the Security Discourse

The negative and even apocalyptic discourse about insecurity "provides a justification for 'pro-active' policing, 'pre-emptive' military strikes and 'administrative and exceptional justice', all of which consider anticipated behaviour as sufficient reason for action."<sup>46</sup> According to the same logic, we take "elaborate precautions against cigarette smoke, obesity, fast food, unprotected sex or exposure to the sun".<sup>47</sup> Kessler regards the precautionary principle as a representation of a 'new discursive practice': "The shift alters the very relation

<sup>40</sup> Adviesraad Internationale Vraagstukken 2009 *supra* note 32, p. 11; I. Ioannides, 'European Union security sector reform policy. What added value?' *Eyes on Europe*, Autumn 2009, p. 37)

<sup>41</sup> Council of the European Union 2003, *supra*, note 26, p. 12

<sup>42</sup> A/63/677, 12 January 2009, Implementing the Responsibility to Protect, quoted by Dame Rosalyn Higgins DBE QC, "Ethics and International Law", Cleveringa Lecture 2009, *mimeo*.

<sup>43</sup> S. Dalby, 'Critical geopolitics and security'. In P. Burgess (ed.), *The Routledge Handbook of New Security Studies*, London and New York, Routledge 2010, p. 57.

<sup>44</sup> Adviesraad Internationale Vraagstukken 2009, *supra* note 32, p. 10

<sup>45</sup> See for example: C. Faria, 'Preventing Illegal Immigration: Reflections on Implications for an Enlarged European Union', EIPASCOPE, Maastricht 2003, pp. 1-5; D. Lutterbeck, 'Policing Migration in the Mediterranean', in *Mediterranean Politics*, vol. 11, No. 1, March 2006, pp. 59-82; L. Amore, and M. de Goede, (eds.), *Risk and the War on Terror*, New York/Oxon: Routledge 2008.

<sup>46</sup> D. Bigo, & E. Guild, 'The worst-case scenario and the man on the Clapham omnibus', in B.J. Goold & L. Lazarus (eds.), *Security and Human Rights*, Oxford and Portland, Oregon: Hart Publishing 2007, p. 116

<sup>47</sup> Z. Bauman *Liquid Life*. Cambridge: Polity Press 2005, p. 69; see also Sunstein 2005 *supra* note 16.



between the political, the economic and the law and thereby goes beyond the image of a 'broadening' of the security concept".<sup>48</sup> This emerging practice goes along with the anticipatory and calculated management of risk.<sup>49</sup>

In this line of thought, we are moving from a post-crime society to a pre-crime society.<sup>50</sup> The pre-crime model has a more 'prospective orientation', concerned with the "calculation of risk and the prevention of future harms in the name of security".<sup>51</sup> Along with Zedner, Borgers & Van Sliedregt observe the emergence of preventive criminal justice, which increasingly works based on the precautionary principle. Their criticism is that the costs derived from the use of the precautionary principle are not sufficiently taken into account. Against the background of social, legal, economic and political developments, the central notion is that citizens ought to be protected against various dangers. Criminal liability is broadened "by criminalizing the preliminary stage before a harmful act has taken place".<sup>52</sup> In the field of counter-terrorism, the precautionary logic has culminated in "an expansion of investigatory and prosecutorial power with regard to terrorism",<sup>53</sup> which is visible, for instance, in pre-trial detention. Furthermore, Borgers & Van Sliedregt observe the widening of the use of secret information in court proceedings: notifications from the General Intelligence and Security Service (AIVD) can be used as evidence in criminal cases. Finally, it has been observed that there is now – as a consequence of UN and EU regulations – the possibility to freeze the assets and confiscate possessions of organisations that are suspected of (participating in) terrorist activities. The prevention of crime, through early diagnosis and the active undermining of would-be deviant activity, means that a classic principle of law – namely the presumption of innocence – is left behind, and that the legal system runs a higher risk of imposing wrongful convictions.

The preventative logic also has a deep effect on law enforcement practices. According to Zedner, the "preventive possibilities of policing were recognised even in its origins", but the "point of intervention has been brought forward",<sup>54</sup> and she associates this with the new – not uncontroversial - doctrine of pre-emption or anticipatory self-defence. 9/11 has given a significant impulse to pre-emptive measures, particularly in relation to radicalisation, terrorism and serious crime.<sup>55</sup> Anticipatory management of criminogenic situations (actuarial

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<sup>48</sup> Kessler 2010, *supra* note 18, p. 23.

<sup>49</sup> Arnoldussen 2009, *supra* note 24, p. 75.

<sup>50</sup> Zedner 2007, *supra* note 4, p. 259.

<sup>51</sup> *Ibid*

<sup>52</sup> M. Borgers, & E. van Sliedregt, 'The meaning of the precautionary principle for the assessment of criminal measures in the fight against terrorism'. *Erasmus Law Review*, 2009-2(2), p. 175. The use of the precautionary principle was already visible in the eighties of the last century, notably in the control of international organised crime and drug trafficking, and codified in – for instance – the Schengen Implementing Convention of 1990 (Official Journal L 239, 22/09/2000 P. 0019 – 0062).

<sup>53</sup> *Ibid* 2009.

<sup>54</sup> Zedner, *supra* note 4, p. 259

<sup>55</sup> *Ibid*

justice) and hyper-social intervention are also identified as factors that encourage the use of pre-emptive measures.

Indeed, with the “War against Drugs” and later the “War against Terrorism”, preventive measures have been widely adopted. Significant is the iterative use of the addendum ‘pre’, for example in Dutch criminal law. In her analysis of the prevention of terrorism through criminal law, Hirsch Ballin talks about “*preceding the pre-trial investigation a preliminary investigation can take place on the basis of facts and circumstances that indications exist that in a group of people crimes for which pre-trial detention can be imposed are being planned or committed.*”<sup>56</sup> Although the requirement is that these crimes are expected to result in a “serious infringement of the legal order” and that there should be a reasonable suspicion, the “public prosecutor can order a preliminary investigation for the purpose of preparing the pre-trial investigation”, and as such the preliminary investigation is “proactive”.<sup>57</sup>

Notwithstanding the introduction of preventive and precautionary measures before 9/11, anti-terrorism legislations have shifted standards and thresholds for the use of special investigation methods. For instance, in the Netherlands, terrorism investigation is extended within the preventive phase. Unfortunately however, the wide-scale introduction of proactive and preventive investigation methods has not been paralleled with a guarantee of procedural rights.

#### IV. Preventive Security Instruments

Within EU security bodies such as Europol and Frontex, risk assessment tools have become accepted working methods. These risk assessments and threat analyses, visible in products such as OCTA (Organised Crime Threat Assessment), have evolved into “strategic future-oriented intelligence systems”.<sup>58</sup> Threat assessments are used as methods to assist policy-makers in designing future scenarios of security and policing. Departing from past criminal cases and certain conceptual tools, predictions about serious crime and other security problems are identified: threat analysis, predictive profiling and forecasting are “based on the assumption that uncertainty can be overcome by developing new information cycles and focuses.”<sup>59</sup>

Risk assessments at the European level build on assessments composed at the national level. For instance, the United Kingdom’s Serious Organised Crime Agency SOCA publishes an annual threat assessment report about various kinds of organised crime, including drug trafficking, fraud, and trafficking in human beings. In a collaborative fashion, the UK Threat Assessment (UKTA) describes

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<sup>56</sup> M.F.H. Hirsch Ballin, *Preventing Terrorism Through Criminal Law. Using Special Investigative Techniques for the Prevention of Terrorism: A Deliberate Deviation from Existing Thresholds?*, Tilburg: Clesus Legal Publishers 2007, p. 13; emphasis is the author’s.

<sup>57</sup> *Ibid.*

<sup>58</sup> T. Vander Beken, and K. Verfaillie, (2010). ‘Assessing European futures in an age of reflexive security’. *Policing and Society*, 2010-20 (2) , pp. 187 – 203.

<sup>59</sup> *Ibid*

and assesses the threats to the UK posed by serious organised crime to prevent the public and private sector, as well as individual citizens, from falling victim to crime.<sup>60</sup> The Dutch National Police Services Agency (KLPD) produces a similar annual threat assessment,<sup>61</sup> which emphasises the forecasting perspective, to be fed into the National Intelligence Model (NIM). The national threat assessment is defined as a *future-oriented* analysis of organised crime in which the threats to Dutch society are addressed specifically. The risk assessment should help create a basis for policy-making, prioritise the attention for certain crime-development, and help intelligence-gathering activities.

With this wide definition in mind, risk assessment reports assess a rather wide variety of phenomena, ranging from trafficking in human beings (exploitation), smuggling of illegal immigrants, illegal trading in and smuggling of weapons and explosives, trading in and smuggling of heroin and cocaine, the production, trading in and smuggling of cannabis and synthetic drugs, the production and distribution of child pornography, the production and distribution of counterfeit money, environmental crime, fraud, money laundering, crime against property, corruption, violence and use of IT.

Surveillance is used widely for proactive security monitoring and has pervaded most modern societies in that it touches almost every aspect of our daily lives.<sup>62</sup> Indeed, technology plays a central role in the surveillance society and in the reconfiguration of security.<sup>63</sup> In a globalised world, where seemingly states are losing control, they operate as co-producers of technologically driven security by acting as the sponsors of new technological devices. The financing of new technological developments that are used for the purpose of enhancing security can be seen as an exponent of mobilizing power. In the 'techno-industrial complex', where industry, politics and security have developed an intimate relationship, we have witnessed the application of several new technologies in security environments.<sup>64</sup> Examples include the wide introduction of camera surveillance in public and private spaces; the use of fingerprints and biometrics for identity cards such as passports; iris scans for pre-boarding procedures; microchips that are placed underneath the skin for scanning prior to entry to clubs; the introduction of infrared and microwave body scanners, particularly at airports; the use of the Global Positioning System (GPS) for the monitoring of mobile telephones; the use of automatic number plate registration (ANPR) on motorways; the electronic interception of telephone, email and text messages; and the use of radio frequency identifiers

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<sup>60</sup> The United Kingdom Threat Assessment of Serious Organised Crime (2006/7).

<sup>61</sup> NTA: National Threat Assessment:

[http://www.politie.nl/KLPD/Images/200830e%20%20%20national%20%20threat%20assessment%202008\\_tcm35-504488.pdf](http://www.politie.nl/KLPD/Images/200830e%20%20%20national%20%20threat%20assessment%202008_tcm35-504488.pdf). (19 July 2011).

<sup>62</sup> D. Neyland, & B.J. Goold, 'Where next for surveillance studies? Exploring new directions in privacy and surveillance (Introduction).' In B.J. Goold & D. Neyland (eds.), *New directions in surveillance and privacy*, Devon: Willan Publishing, 2009, p. xv.

<sup>63</sup> A. Barry, *Political machines; Governing a technological society*. London and New York: Athlone Press 2002.

<sup>64</sup> Cools *et al.* 2010, *supra* note 31.

(RFIDs) in consumer products.<sup>65</sup> Eventually, an intelligence-based, electronically monitored system of border controls may be developed across the EU.<sup>66</sup> This includes the introduction of compulsory fingerprint biometric identity cards and specific identity cards for people who work on sensitive locations such as airports.

## Conclusion

The emergence of new security threats and the wide propagation of the integrated, preventive, proactive, intelligence-based approach raises a number of questions concerning legal and political governance. Values that are embedded “in a pre-emergency institutional culture that take[s] seriously rule of law values [are] much more difficult to be able to contain official abuses of power, making it more difficult to shift underground.”<sup>67</sup>

A first issue is whether equity – a norm which implies that all citizens should equally profit from the benefits of a social welfare state as the prime provider of security – can still be upheld in an era of asymmetric distribution of rights, justice, and security and surveillance. Future deviance is increasingly often countered through a series of preventive measures against the first people to be suspected. In a patriarchal governance style, the movements and transactions of the masses are anticipated and calculated with the help of surveillance measures. The prevention of future crimes and other forms of misconduct may become subject to social engineering. Though proactive intervention in personal lives seems to have become a widely accepted mechanism, it may gradually lead to the erosion of the presumption of innocence. A related legal challenge is the ability to prove malice aforethought, certainly if there has not been a material or physical perpetration of a criminal offence. In the context of counter-terrorism and anti-organised crime efforts, there has been ample emphasis on the criminalization of preparatory acts, such as conspiracy and the financing of terrorist activities. This involves a close reading of the mind of the potential criminal or terrorist.

Finally, the blurring between police and military, public and private, national and international governance<sup>68</sup> requires new parameters to ensure procedural legitimacy.<sup>69</sup> If the horizon of security-focused thinking is subject to constant change, it will entail the reconfiguration of security organisations and their

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<sup>65</sup> M. den Boer, & J. van Buuren, (forthcoming), ‘Security Clouds. Towards an Ethical Governance of Surveillance in Europe’, in *Journal of Cultural Economy*, special issue edited by M. de Goede and L. Amoore.

<sup>66</sup> Cabinet Office 2008, *supra* note 17, p. 57.

<sup>67</sup> V.V. Ramraj, ‘Between idealism and pragmatism: Legal and political constraints on state power in times of crisis’, in B.J. Goold, & L. Lazarus (eds.), *Security and human rights*, Oxford and Portland Oregon: Hart Publishing 2007, p. 200.

<sup>68</sup> M. Easton, et al., (eds.), *Blurring Military and Police Roles*, The Hague, Eleven International Publishers 2010.

<sup>69</sup> Houben 2003, *supra* note 22; C. Ryngaert, ‘Litigating Abuses Committed by Private Military Companies’, *European Journal of International Law*, 2008-19, pp. 1035-1053.

mandates. Forecasting methods raise pertinent ethical issues,<sup>70</sup> for instance how the information – intelligence – is gathered and whether this involves disproportionate measures at the expense of private life. How serious should indications of future crimes or acts of war be before forecasting methods are legitimised? What kind of conditions apply when police, law enforcement, or military intervene proactively in order to pre-empt public disorder, crime or war? The precautionary principle has already pervaded many spheres of justice, which fact requires an objective, comprehensive and balanced discussion of trust and legitimacy concerns.

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<sup>70</sup> S. Bok, 'Secrets: on the ethics of concealment and revelation', Oxford, Oxford University Press 1986, quoted in P. Klerks, 'Methodological aspects of the Dutch national threat assessment'. *Trends in Organized Crime*, 2007-10(4), pp. 91-101.